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No. 63

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE UNITED STATES OF AMERICA

vs.

W. M. WEBB, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 218-241) were officially reported at 271 F. Supp. 249. The opinion of the Court of Appeals for the Fifth Circuit below (Pet. App. A, 1a-9a) is reported at 402 F.2d 956.

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the petition. Time for filing the response was extended by the Clerk of the Court to April 14, 1969.

QUESTION PRESENTED

The sole question presented is whether fishermen (captains and crewmen) operating menhaden fishing boats owned by the respondents were their "employees" as that term is defined in the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA), Sections 3121 et seq. and 3306 et seq. of the Internal Revenue Code of 1954; 26 USCA §§ 3121 et seq. and 3306 et seq.

STATUTES AND REGULATIONS INVOLVED

The specific statutes involved are §§ 3121(d) and 3306 (i), Internal Revenue Code of 1954; 26 USCA §§ 3121(d) and 3306(i), and the interpretive regulations, 26 CFR § 31.3121(d)-1 and § 31.3306(i)-1. They are set forth in the Appendix, *infra*, pp. 20-22.

STATEMENT

The importance of the facts to the decision requires a full summary of the district court's findings of fact. (R. 219-238) Petitioner's statement of the case ignored a number of the district court's special findings, necessary to its conclusions, and distorted others.[1] Adding to those already stated (Pet. 2-6), the following are considered pertinent:

The business of each respondent embraced: (1) owner-

[1] A material distortion in petitioner's statement is embraced in the words (Pet. 4): "The captain could be fired if he failed to follow a respondent's instructions (R. 224)." We have searched the district court's findings and petitioner's record reference to no avail. We think this statement exceeds the reasonable bounds of inference and the outer limits of editorial license. It is a bald and transparent attempt to inject elements of control into the court's findings which do not exist. The contrary was evident. See, R. 237, Fdg. 47. The petitioner's record reference ("R. 224)" at (Pet. 4) to the nonexistent language is a callous disregard for material matters basic to the resolution of questions raised by the petition.

ship of one or more menhaden fishing boats; (2) the fishing for menhaden under contractual arrangements with certain captains and (3) the processing of the fish into fish meal products for sale on the open market. (R. 221; Fdg. 7)

The employment tax effect of the contractual arrangement between each respondent and the fishermen (captains and crewmen) was the sole question for determination below. (R. 219) While not formalized by the parties and designated as such, the district court found that the arrangement between them constituted an oral contract. (R. 224; Fdg. 15). To this end, respondents relinquished control of their fishing boats for a season [2] to captains who provisioned them at their own expense as they saw fit and staffed them with crews selected without interference by the respondents. (R. 221, 227, 231; Fdgs. 8, 22, 34) Further, it was the exclusive prerogative of the captains to conduct the fishing operations, actually and entirely, by their own means and methods without interference by the respondents and without a guarantee of compensation of any kind. (R. 221, 224, 228; Fdgs. 8, 15, 25, 31) Unless fish were caught, the fishermen had no earnings. (R. 230, Fdg. 31)

The general area to be fished (the Gulf of Mexico or Atlantic Ocean) was determined by the seasonal presence and availability of the menhaden fish. When a choice of two places to fish occurred, the captain's preference was a factor in a joint decision with the respondent. (R. 225, Fdg. 17) By their own choice the captains fished either the Gulf of Mexico or the Atlantic Ocean. Some fished in both areas for consecutive seasons in a single year. Some captains contracted for a single season for a single year. Others fished a single season for respondents and at other times for competitors without any pattern of continuity

[2] A fishing season lasted anywhere from three to seven months depending upon the area fished. (R. 224, 225; Fdgs. 13, 16).

of relationship with the respondents. (R. 225, 226; Fdg. 18) Payment was made by respondents to captains at an agreed rate per unit, i.e. each "1000-fish" caught and delivered. (R. 230, Fdg. 30)

The commencement and termination of each season was considered a separate and complete undertaking by the captains and respondents. New negotiations between the parties respecting prices per "1,000 fish" and arrangements for staffing and provisioning of the boats were commenced with each separate season. There was no pattern of continuity in the service relationship beyond the short seasonal fishing period, each of which inaugurated a new set of fiscal and personnel records between the fishermen and respondents. (R. 226-227, 230; Fdgs. 19, 20, 32)

While respondents determined that a crew of 24 men was necessary for successful fishing (Pet. 4), additional persons could be hired in the captains' discretion who, in turn, bore the burden of the extra expense. Fewer than 24 men were not shipped by a captain without first consulting a respondent. (R. 227; Fdgs. 21, 22) Although respondents furnished the captains with seasonal pay scales for crew members (Pet. 4), each captain was privileged to increase the amount paid the crewmen, but, again, he assumed the burden of the extra expense without reimbursement by the respondent. (R. 228; Fdgs. 23, 24)

Although it was in the interest of the parties to fish the boats as often as practicable, whether a boat remained in port due to unseaworthiness or bad weather were considerations left solely to the discretion of the captain, as opposed to the respondents. (R. 234; Fdg. 40) A captain used the radio communications facilities aboard the boat as he deemed necessary, without interference by the respondent and freely accepted or rejected the services of fish spotter airplanes provided by the processing plants. (R. 236-237; Fdg. 45) Although the arrangements described could be terminated voluntarily or involuntarily

by either party at the end of any trip (Pet. 3), the captains did not leave their boats prior to the season's end. There was no evidence of termination of any relationship or contract during a season. (R. 237; Fdg. 47)

The district court further found that, (1) there was no express agreement specifying the extent to which respondents had control over the fishing activities of the captains and it was clear that no actual control was exercised over the details, manner or method employed by the captains and their crews. (R. 236; Fdg. 44); (2) that respondents had no agreement with the captains that entitled them to a preferred call on all the time and services of the captains (R. 237; Fdg. 48); and (3) that respondents had no actual control over the crewmen, nor did they exercise any control over the latter's activities through the captains. (R. 238; Fdg. 49)

In applying the common law test of the employer-employee relationship, it was open to the district court to hold that for purposes of §§ 3121(d) and 3306(i), the fishermen were employees of the respondents. But it was obvious from its findings of fact that the district court had the common-law control test clearly in mind. (R. 236, 237, 238; Fdgs. 44, 46, 48 and 49) And the Circuit Court below affirmed, noting that there was ample evidence in the record to support the district court's findings. (Pet. App. A, p. 9a)

REASONS FOR DENYING THE WRIT

Argument

I. Petitioner's contentions that different approaches exist between the Fifth Circuit opinion below (Pet. App. A, p. 1a), the Court of Claims[3] and the First Circuit[4]

[3] *Cape Shore Fish Co.* v. *United States*, 330 F.2d 961, and *Kirkconnell* v. *United States*, 347 F.2d 260.

[4] *Capital Trawlers, Inc., et al* v. *United States*, 324 F.2d 506, aff'g., *per curiam*, 216 F. Supp. 440.

(Pet. 6-7) respecting the issue involved here will not withstand analysis.

Petitioner concedes that the common law test determining who are employees, provided in §§ 3121(d) and 3306 (i), Title 26, United States Code, was applied to all the cases claimed differently approached. (Pet. 2, "question presented", 10-11, 12) It clearly appears therefore, that the asserted conflict in "approaches" arises from differences in states of fact, or from different inferences drawn from similar facts and not in varied applications of a principle of law. In these circumstances the writ should not be granted.[5]

Petitioner forcefully argues that a complete identity of circumstances, without important factual differences, exists among the cases cited (Pet. 7, 10) and a rule of law should be fashioned by this Court, under its supervisory powers, to govern lower court decisions respecting tax incidence growing out of service relationships in the fishing industry. (Pet. 6, 9, 10) A casual reading of the petitioner's authorities cited for comparison[6] (Pet. 7) discloses material differences from those at bar.

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[5] *Wisconsin Electrical Co.* v. *Dunmore*, 282 U.S. 813.

[6] Material departures in petitioner's citations from the case at bar are:

Cape Shore Fish Co. v. *United States, supra;* the service relationship was governed by a union contract which materially controlled the captain's hiring practices, curtailed his freedom of boat operations as to time of departure, arrival and the fixing of working hours and watches at sea for the crew; payments were guaranteed following "brokers", and patterns of long and continued relationships were evident in a general atmosphere of supervision of the captains under sanctions for failure to follow the owner's instructions.

Capital Trawlers, Inc., et al v. *United States, supra;* the arrangement provided for guaranteed payments following a "broker", patterns of continuity of service relationships for extended periods and control by the owner over details of the fishing operations, including staffing and provisioning of the boats.

[Footnote continued on page 7]

But assuming, *arguendo*, that the facts were not materially different, as alleged, the rule is that where the jury has tried the matter upon instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. Where, as here, the trial has been by the judge without a jury, the judge's findings must stand, unless "clearly erroneous." F.R.Civ.P. 52(a), 28 USCA. These rules will on many occasions be presented in cases deciding service relationships, not alone in the fishing industry, but any industry. And, as observed by the Circuit Court below (Pet. App. A, p. 3a), Congress having been explicit when it amended Sections 3121(d) and 3306(i), Internal Revenue Code, that the common-law standards alone should be applied, anticipated a variance in results by triers of the facts.[7]

The facts stressed by petitioner indicated at most that the question of the fishermen's status was a debateable one, that is, one upon which reasonable men may differ. *Baker* v. *Texas & Pacific Ry. Co.*, 359 U.S. 227, 228. It was open to the fact finder to reach a contrary result but the respondents prevailed. Decisions in close cases are a familiar litigation casualty to which the government is no more immune than taxpayers.

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[6] [Continued]

Kirkconnell, et al v. *United States, supra;* a union contract permeated the service relationship, creating an atmosphere of tight control by the owner over the captains including crew hire and permanency of relationship. The Court of Claims called this a "very close case." (*id.* 347 F.2d at p. 267) All three cases contained language distinguishing their facts from those in Fifth Circuit cases cited reaching contrary results.

[7] "Thus the inquiry when proceeding under the usual common-law rules, realistically applied, has a clearly focused and practical end point. A whole field of pertinent fact, documentary and otherwise, is available to cast its weight one way or the other. Commonsense and our own experience tell us that the rule so applied will work a reasonable sifting of difficult cases." Sen. Rept. No. 1255, 80th Cong. 2d. Sess., p. 10; 2 U.S. Code Cong. Serv., 1948, at p. 1762.

It is not in harmony with sound practice considering the nature of this Court's function and those of the district courts for the Supreme Court to undertake drawing the final conclusion generally in these border-line cases. Having declared the principles of law in *Enochs* v. *Williams Packing and Navigation Co.*, 370 U.S. 1 (discussed, *infra*, p. 10) to be applied in these boatowner-fishermen cases, the function of this Court is sufficiently discharged by seeing to it that they are observed. When this has been done, drawing the final conclusion in matters so largely factual as the end result must be in close cases, it is more properly the business of the district courts than this Court.

II. Alternatively, petitioner argues that the holdings in the case below and similar cases were not resolutions of fact issues at all, but were ultimate conclusions based on undisputed facts, representing pure questions of law which are subject to plenary review on appeal. (Pet. 9) Citing *United States* v. *Silk*, 331 U.S. 704 and *Bartels* v. *Birmingham*, 332 U.S. 126 (Pet. 9, 11) for support, petitioner not only misread those cases but ignored the rules basic to issuing a writ of certiorari.

The writ was granted in those cases in 1947 because the federal courts were applying varying standards when determining who were employees under the Act. This Court observed in *Silk* (*id.* 331 U.S. at 711): "No definition of employer or employee applicable to these cases occurs in the Act. * * * Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the Act or amendments thereto."

But, as petitioner says, in 1948 Congress passed clarifying legislation defining the term "employee". (Pet. 10-11) There could be no mistake that the common law standards and those alone were to be applied. The text

is contained in the petition, App. A, at 2a, 4a and in the Appendix *infra*, pp. 20-22.

Although the moving principles in *Silk* and *Bartels* were consistent with the common law rules, the Committee Reports leading to the amendments emphatically rejected and overrode the liberalized "economic reality test" suggested by this Court in prefatory remarks in *Silk*,[8] and as *dictum* in *Bartels*,[9] which led to a new regulation proposed by the Treasury Department for deciding employee status.[10] (Pet. App. A. p. 3a) Thus Congressional enactment removed the uncertainty of definition as to who were "employees" under the Social Security Act. No serious question of construction of a statute of nationwide importance remains, nor does petitioner present an issue of clarity.

Petitioner would equate Congress' desire for "nationwide uniformity of application of the act" (Pet. 11) with some litmus paper test for deciding who are employees under the common-law rules. Even the Treasury Department in the text of its implementing regulations,[11] approved by the Congress as the test to be applied, realized that the diverse blends of personal relationships in

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[8] 331 U.S. 704 at 713.

[9] 332 U.S. 126 at 130.

[10] "But, we repeat, if it be argued that the Supreme Court decisions establish a new definition of 'employee', then it is the purpose of this resolution to reestablish its meaning according to the usual common law rules, realistically applied." Senate Rept. No. 1255, 80th Cong. 2d Sess. p. 7; 2 U.S. Code Cong. Serv. (1948) at p. 1758.

[11] See, 26 CFR §§ 31.3121(d)-1 Who are employees.

* * * *

(c) Common law employees. * * *

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

our industrial society present niceties for ajudication which can not be put to rest by any kind of general formulation. In situations so dependent upon the inferences drawn from the facts in each case, the desired uniformity of decision urged by the petitioner can be achieved only by the application of appropriate legal rules, whether by the judge as the trier of facts or the jury under appropriate instructions.

The Committee Report leading to amendments of §§ 3121(d) and 3306(i) contained a chapter titled: Uniformity of Application of the Act Promoted by Supreme Court Decisions Applying the Existing Regulation." The text following said in substance that the existing Treasury Regulations "provide the answer to the Federal Security Agency for a rule of common application promotive of more uniform coverage of the act * * *" and encouraged its continued application rather than invite changes which would give "rise to new uncertainties, more varied interpretations, a larger area for litigation, greater diversity of judicial decisions." (Senate Rept. No. 1255, 80th Cong. 2nd Sess. at p. 18; 2 U.S. Code Cong. & Admin. News (1948) at p. 1769.)

The notion that "employee" status under §§ 3121(d) and 3306(i) is a question of law runs counter to this Court's decision in *Enochs* v. *Williams Packing and Navigation Co.*, 370 U.S. 1, holding the employment status of fishermen for social security tax purposes is a question of fact.[12] The *Enochs* v. *Williams* decision was based on jurisdictional grounds not here applicable and discussed the merits only for the purpose of determining "whether the government has a chance of ultimately prevailing."

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[12] "These sections specifically adopt the common law test for ascertaining the existence of the employer-employee relationship. As stated in *United States* v. *Silk*, 331 U.S. 704, 716, 'degrees of control, opportunities for profit or loss, investment in the facilities, permanency of the relation and skill required . . . . are important for decision [under the statutes]'." (370 U.S. at 3)

On that record it held: "The record before us clearly reveals that the government's claim for liability was not without foundation." (370 U.S. at 8) Also, the government's petition for a writ of certiorari in *Williams, supra*, successfully argued, "The record and issues in the present case pose questions of law and fact * * * which are subject to reasonable disagreement * * *." Likewise, the government's brief on the merits in *Williams* took considerable comfort in the Circuit Court's dissenting opinion which described the issue, deemed controlling by the majority, as "closely and hotly litigated purely as a question of fact." See, Vol. 132 of the Supreme Court Records and Briefs, Oct. Term 1961, No. 493, Petition at p. 7, and petitioner's Brief at pp. 23-24.

Unsuccessful taxpayers appealing adverse verdicts in employment tax cases respecting other relationships[13] have urged reversal, contending that the issue was one of law for the Court and should not have been submitted to the jury. The government opposed, arguing that conflicting inferences deducible from the facts were properly jury questions. The reviewing courts affirmed in each instance. Thus, petitioner would require the respondents plead in vain the very contentions urged so successfully by the government.

The opinion below at most presents a unique set of facts not likely to recur. Respondents pray the Court to accept the concurring opinions of two courts below. We believe the Circuit Court's decision below is not one that will have importance beyond the particular facts and parties involved, nor is it in conflict with the applicable decisions of this Court. The petition for the writ should be denied.

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[13] *Lifetime Siding Co.* v. *United States*, 359 F.2d 657 (CA-2), cert. denied 385 U.S. 921 (siding applicators);

Service Trucking Co. v. *United States*, 347 F.2d 671 (CA-4) (truck unloaders);

Hoosier Home Improvement Co. v. *United States*, 350 F.2d 640 (CA-7) (window installers).

III. Petitioner's third ground, hardly a model of clarity, has two features: *First*, that the decisions in the Court of Claims and the Fifth Circuit give opposing constructions to the term "common law rules" in § 3121(d), which should be resolved by this Court; (Pet. 12, 15) and *Second*, as we understand it, petitioner says that respondents are liable for FICA and FUTA taxes on the earnings of fishermen even though they are not employees under the common-law standards prescribed by §§ 3121(d) and 3306(i), Internal Revenue Code, so long as the respondents, as owners of the boats, are liable to the fishermen for maintenance and cure under maritime law. (Pet. 13, 14, 14) The contentions are indefensible. We take them in order.

First, there is no conflict between the Court of Claims in *Cape Shore Fish Co.* and the Fifth Circuit decisions cited.[14] They are in full accord. As did the Fifth Circuit, the Court of Claims in *Cape Shore* applied the common-law standards in the statutes and Treasury Regulations involved to the facts adduced. (330 F.2d at 962, 964-5) *Cape Shore* listed as controlling (*id.* at 965) this Court's decision in *Enochs* v. *Williams Packing Co., supra*, which settled the question, saying: "These sections specifically adopt the common-law test for ascertaining the existence of the employer-employee relationship." (370 U.S. at 3) Petitioner's asserted conflict became self-defeating when the Court of Claims itself, in *Cape Shore*, distinguished the contrary results reached by the Fifth Circuit in *Crawford Packing Co.*, stating: "The facts in *Crawford Packing* differed in material respects from the facts here." (330 F.2d at 973; ftn. 18)

Petitioner observed that the "Court of Claims examined the maritime cases in detail and relied for its conclusion on the fact that under maritime law the arrangements in that case would not have sufficed to relieve the

[14] *United States* v. *Crawford Packing Co.*, 330 F.2d 194 (Pet. 6, 8, 10, 12) and the opinion below at Pet. App. A, 1a et seq.

boat owner of the employer's traditional obligations to his seamen." (Pet. 14) The observations are beside the point. A boat owner's obligations for maintenance and cure have no relation to his tax liabilities on the seamen's earnings under FICA and FUTA. Each obligation and liability is governed by different acts having different legislative purposes. Maintenance and cure is a fact of the seaman's attachment to the boat which creates the right and not the form of the contract with the owner. A term in a contract under which a seaman purported to waive the right would be unquestionably void. Gilmore & Black, *The Law of Admiralty*, 1957 ed. p. 257. "Employees" defined under the FICA and FUTA statutes are specifically described and their identity for tax purposes is finely drawn. On the other hand, the term "employee" in maritime law is left at large, without definition to give effect to the ameliorating purposes of maritime law which recognizes the cost and debilitating effect of industrial injury. That the fishermen here are not employees in the common law sense is no bar to their rights and protection as wards of the admiralty court under maritime law. This Court said in *Hopson* v. *Texaco Co.*, 383 U.S. 262 at 263-4, that the application of the Jones Act, an extension of the maritime law, was "an avowed departure from the rules of the common law * * *."

Suffice it to say here that the Court of Claims' discussion of maritime cases was *obiter dicta*, having only historical significance. It is noteworthy that in *Kirkconnell* v. *United States*, *supra*, decided after *Cape Shore*, the Court of Claims reached a similar result, but made no mention of maritime law as a basis for conclusion that the fishermen were employees. Applying solely §§ 3121(d), 3306(i) and the Regulations in *Kirkconnell*, the Court of Claims again distinguished the contrary results reached by the Fifth Circuit and added that it was a "very close case". (347 F.2d at 265, 267) It seem strange indeed that petitioner's authorities, i.e., *Kirkconnell* in the Court

of Claims and *Capital Trawlers* in the First Circuit, cited earlier in the petition (Pet. 7) to support its transparent assertions of conflict have not been summoned here to lend aid and comfort to petitioner's maritime-oriented employee argument.[15]

All that remains is a *dictum* from a single case which was later disowned by the same Court of Claims that spawned it. Numerous cases deciding the same tax issue, applying the same rules of law made no reference to principles of maritime law. The *dictum* in *Cape Shore* has authority only in the government's petition.

The *second* feature of petitioner's ground suggests that in seafaring arrangements boatowners are liable for FICA and FUTA taxes on the earnings by seamen by virtue of the former's obligation to the latter for maintenance and cure, irrespective of the true service relationship stemming from the contract between them. (Pet. 13, 14, 15) On its face the contention is unsound. As we said, the clear differences between the term "employee" specifically defined and circumscribed under the common law tests outlined by the tax statute on the one hand, and the term "employee" under maritime law which is without definition on the other, should conclude the matter. Petitioner thus puts forth a contention which not only ignores basic concepts in admiralty and maritime jurisprudence, but also ignores elementary principles of statutory construction. Their exposition is out of place in these limited proceedings. Suffice it to say that this Court pointed the way in an analogous situation, a labor case, in *NLRB* v.

[15] The petition is not uniformly respectful of its own cited autorities. At Pet. 7 and 15, petitioner asserted an alleged conflict within the Fifth Circuit citing *Jackson* v. *Phinney*, 266 F.Supp. 835 (WD Tex., 1967) as indicative of the necessity for resolution of the conflict by this Court. Holding the fishermen employees under § 3121 (d), the district court rejected the government's maritime argument, stating that "it seems questionable at best whether Congress in reaffirming the use of the common-law tests intended to thereby incorporate maritime law under the FICA and FUTA". (id., at 839)

Hearst Publications, Inc., 322 U.S. 111 at 122, saying: "* * * a person who * * * is held to be an 'independent contractor' for the purpose of imposing vicarious liability in tort may be an 'employee' for purposes of particular legislation, such as unemployment compensation."

Thus, while the fishermen may be excluded from the common-law type employee category they are nevertheless "employees" for maintenance and cure under the liberal tests applied in maritime law. In this regard this Court further stated (*id*, 322 U.S. at 126):

> "Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied."

In short, because of the difference in concept between an "employee" for federal tax purposes and an "employee" for compensation purposes under maritime law, the fishermens' right to maintenance and cure or Jones Act benefits cannot be considered an indication that they were employees in the common law sense. The sole issue here is whether these fishermen were employees within the meaning of the pertinent federal tax statutes. This question cannot be determined by whether or not they were employees within the meaning of the Jones Act or general maritime law. (Pet. 14) This action was brought by respondents solely to recover taxes overpaid by them. The fishermen have no direct interest in this controversy, nor does it appear their rights to maintenance and cure, or any other rights, are affected. The fishermen's status for other purposes is not in issue here, nor would it seem they were bound by any attempt to decide such status in a proceeding in which they are not parties.

This Court's observation in *Burlington Truck Lines* v. *United States*, 371 U.S. 156 at 173 is appropriate here:

> "'* * * nor should a determination under one statute be mechanically carried over into the interpretation

of another statute involving significantly different considerations and legislative purposes.' "

Thus it may be said that while petitioner's maritime concept is basic to the resolution of suits between owners, captains, crewmen and outside third parties, it is a non-sequitur in the resolution of tax controversies where the parties are solely the United States and the boatowner-respondents.

The opinion below observed that the Treasury Department unsuccessfully proposed to Congress that § 3121(d) be amended to include as "employees" captains and crewmen of the kind concerned here, irrespective of their employment status under the common law rules. The Committee's rejection of the agencies' maritime-oriented employee was considered by the Circuit Court as indicative of Congress' intention to retain the common law control test as the sole test here for tax purposes. (Pet. App. A, 7a and footnotes 5 and 6) In recent times Congress amended various parts of Sections 3121 and 3306 of the Internal Revenue Code, but subsections (d) and (i), defining "employee" remain intact—lending weight to the common-law definition of employee. If we understand the petition correctly, it invites this Court to sit as a congressional committee to bring about by its certiorari jurisdiction that which the Congress refused to do by legislative amendment.

Petitioner's reference to 26 U.S.C.A. § 3306(c)(17) (Pet. 13) demonstrates the government's confusion in attempting to frame an issue for the Court to resolve. Although proposed by the petitioner (Pet. 13-14), that section has no bearing on the old-age benefits program administered under Title II of the Social Security Act and the correlative tax provisions of the Federal Insurance Contributions Act (FICA), §§ 3121 et seq. Petitioner's reference deals solely with Title III of the Social Security Act, and the correlative tax sections of the Federal Unemployment Tax Act (FUTA), § 3306, et seq. The latter

provisions are concerned solely with grants of money to those states having unemployment insurance programs approved by the Social Security Administration. And even in this limited area, the common law standards prescribed in §§ 3306(i), Internal Revenue Code determine whether fishermen on vessels over 10 gross tons are employees for unemployment insurance tax purposes. A careful reading of § 3306(c)(17) shows that fishermen on vessels under 10 gross tons are exempt, irrespective of their status under the common law standard.

Petitioner's single reference to S.S.T. 387, 1940-1 Cum. Bull. 192, as the official position of the Social Security Administration (Pet. 7) is misleading. It cannot be the official or other position of anyone. It has no sanction in the law. S.S.T. 387 was promulgated under the Federal Insurance Contributions Act, Sections 1426(b)(14) and (g) of the Internal Revenue Code of 1939. The 1954 revision of the Internal Revenue Code renumbered the FICA as §§ 3121, et seq. The provisions relating to fishermen contained in the 1939 Code sections were deleted from FICA entirely in the 1954 Code. No basis for granting the writ is warranted by any contention put forth.

IV. The petitioner, in closing, sugggests that the contrary results in these cases may pose some administrative problems for the Social Security Administration in dispensing benefits. (Pet. 15-16) A further assertion is made that benefits may be denied to some, while they accrue to others without payment of the required social security taxes (Pet. 16). These notions are not only unsound, but disclose a gross misconception of the social security system.

It is common knowledge that following the enactment of the Self-Employment Contributions Act of 1950 (SECA) (64 Stat. 524) §§ 1401, et seq., Internal Revenue Code, all persons, employees under any test and others in service relationships, including conventional independent contractors (with few exceptions), are covered under the social

security program and accorded equal benefits. (Title II, Social Security Act; 49 Stat. 623 and 64 Stat. 482, 490) The benefits so accorded are based upon the individual's earnings. Taxes are paid by those liable for them and are collectible under the provisions of the FICA and SECA Acts. Under FICA the taxes are paid by the employer and employee in equal shares. The employer bears the burden of certain administrative duties and payments. His failure to abide by them may result in assessments and penalties and possible criminal sanctions. See, 26 U.S.C. § 7202. Under the Self-Employment Contributions Act (SECA) the individual pays the tax, (about ¾ of the combined FICA tax) and assumes the responsibilities for reporting and payment to the tax collector. The alleged problems, it seems, lie with the agencies who, for administrative convenience, bring pressure to bear on respondents and others to assume liability for taxes under FICA without a basis in law or fact.

The asserted "dilemma" of the Internal Revenue Service complained of (Pet. 17) is self-induced. Systematic refusal to consider (R. 3, par. 10) and summary disallowance of claims for refund, without examination of the working relationships in issue, are a standing National Office policy of the Internal Revenue Service in disposing of all boatowner-fishermen claims. By this device the agency transfers its entire administrative responsibilities to the courts to sift the validity of the claims on a case by case basis, and, by a show of statistics (Pet. 17) accuses the respondents and other taxpayers for the responsibility of increased calendar loads in the Fifth Circuit. Respondents were left no alternative in these circumstances but to bring this suit. Review of the decision below by writ of certiorari will not resolve the petitioner's administrative lapses.

CONCLUSION

The decision of the court below is clearly correct. There are no conflicts of decision, and the case does not call for review. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

Sec. 3121. DEFINITIONS.

* * * *

(d) EMPLOYEE.—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;

* * * *

Sec. 3306. DEFINITIONS

(i) EMPLOYEE.—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * * *

(26 U.S.C. 1955 ed., Sec. 3121 and 3306)

Treasury Regulations under the 1954 Internal Revenue Code, promulgated under the Federal Insurance Contributions Act:

§ 31.3121 (d)-1. Who Are Employees.

(a) * * *

(c) Common Law Employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing service as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, den-

tists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees. If an individual enters into an agreement with another person pursuant to which such individual undertakes or produce a crop or livestock on land owned or leased by such other person and pursuant to which (i) the crop or livestock produced by such individual or the proceeds thereof are to be divided between such individual and such other person, and (ii) the amount of such individual's share depends on the amount of the crop or livestock produced, such individual is, with respect to such undertaking an independent contractor and not an employee.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

Treasury Regulations promulgated under the Federal Unemployment Tax Act,

§ 31.3306(i)-1. Who Are Employees

* * * *

are the same for purposes of this case as provided in § 31.3121(d)-1, Federal Insurance Contributions Act and Regulations thereunder.